(3)
Supreme Court
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Nº. 99-67

In The
Supreme Court of the United States

SUPER SULKY, INC.,
Petitioner,

v.

U.S. TROTTING ASSOCIATION,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S FACTS

Petitioner disagrees with certain of Respondent's factual characterizations.[1] For instance, contrary to Respondent's contention (USTA Brf. at 8), the record *does* support Petitioner's contention that, prior to the taking of the drivers' poll, members of the IWSC intended to make the "modified" (*i.e.*, the traditional) sulky *the* standard and were "sure" that the early drafts of the rule would eliminate the Cheetah. (App. G-I, attached hereto). Additionally, although the trial court admitted the drivers' poll into evidence, the jury was instructed that "the results of the poll do not, standing alone, constitute any proof as to the safety or lack of safety of the Cheetah...." (App. J, attached hereto). Respondent's suggestion that the IWSC's proposed ban had no force and effect of its own on the sulky market was also effectively refuted at trial; the evidence established that, to participate in harness racing as an owner, driver, or trainer, one had to be a USTA member, and that USTA members are bound by USTA

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[1] Although not critical to the Petition's merits, Petitioner adamantly disputes Respondent's assertion that to suggest that the issue of parity "first surface[d]" upon the USTA's consultation of Professor Meeks misrepresents the factual record. (USTA's Brf. at 4, n. 1). The Petition was worded so as *not* to suggest that the issue of parity "first surfaced" when Mr. Meeks was consulted, but that it first came "into the spotlight" (*i.e.*, became a more significant issue) when he joined the defense team. The record at trial indicated that although the issue of parity in races was mentioned during the sulky controversy, it was not the main focus of the rulemaking process, and the rule was publicized by the IWSC as a "safety" rule.

rules, violation of which can subject the members to fines, suspension, or expulsion. Thus, although if a USTA rule conflicted with a State Racing Commission rule, the USTA's rule would have to give way, barring such conflict, the membership understood that a USTA sulky ban would affect their ability to use (and hence their incentive to purchase) the banned product. As Super Sulky's president testified, following the announcement of the IWSC's proposed standard, Petitioner's sales dropped precipitously, as "[p]eople weren't going to buy a bike that they couldn't use."

It should also be noted that the "one knowledgeable observer" whose testimony the USTA touts as proving the sulky market's "strong" competitiveness following the ban (USTA's Brf. at 10) is none other than William Card, the president of alleged conspirator Jerald Sulky.

REPLY TO RESPONDENT'S ARGUMENT

A. The Law As To Petitioner's First Issue Is Not Well-Settled.

Respondent provides no satisfactory answer to the first issue presented in the Petition. Petitioner challenges *Riverview Investments*[2] "conspiracy" test as not being a proper statement of the law; Respondent answers that it *must be* correct as the appellate court had no difficulty in applying

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2 *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990).

it here, or as other courts have followed similar analyses in evaluating the existence of antitrust conspiracy. Respondent's answer thus begs the question, and never moves any closer towards validating *Riverview Investments*' test as a proper statement of law. This is the legal issue which demands resolution, and upon which this appeal turns. If *Riverview Investments* is incorrect, then so is the ruling that deprived Petitioner of its jury verdict. If *Riverview Investments* is incorrect, then so is the Sixth Circuit's published opinion which will continue to propagate incorrect analyses.

Petitioner is not disputing the validity of *Monsanto*[3] and *Matsushita*[4] as applied to their proper contexts: to assessing the existence of a conspiracy inferred from the alleged conspirators' ambiguous parallel conduct. But where, as here, the conspirators' conduct was purely collective or collaborative in nature; where, as here, the alleged conspirators *could not have achieved the restraint in question without each others' help*; then, it defies sound analysis to inquire into their motivations as a means of determining whether they pursued an agreed course of conduct. An agreement is no less an agreement simply because the contracting parties have independent reasons for entering into

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Monsanto Corp. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

4

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 572 (1986).

it.

This Court should thus accept review of this case to clarify the proper analysis that will determine the existence of an antitrust conspiracy when the conduct alleged is joint and collaborative, as opposed to being merely parallel.

B. <u>Respondent's Treatment Of Petitioner's Second And Third Issues Highlights The Importance Of This Controversy.</u>

By addressing the Petitioner's second and third issues jointly, Respondent avoids having to admit that the rulemaking of private standard setting organizations is commonly treated as a conspiracy among the membership. Indeed, of the sports rulemaking cases cited at n. 3 of Respondent's Brief, *none* were disposed of on a finding that no "conspiracy" was proven; and *none* suggested that the rulemaking of private sports sanctioning organizations is in any sense immune from antitrust scrutiny. Rather, *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977), *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *Deesen v. PGA*, 358 F.2d 165 (9th Cir. 1966), *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n, Inc.*, 511 F.Supp. 1103 (D.Neb. 1981), and *STP Corp. v. U.S. Auto Club, Inc.*, 286 F.Supp. 146 (S.D.Ind. 1968) all involved bench trials where the trial court, after full-blown Rule of Reason analysis, concluded that the procompetitive benefits of the rule outweighed its

anticompetitive effects. *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984) also resulted from bench trial factual findings, but the appellate court reversed on the ground that the evidence did not support a § 1 violation, given that the "single tire rule" (unlike the ban here) was limited in terms of time and geographically. Finally, *U.S. Trotting Ass'n v. Chicago Downs*, 665 F.2d 781 (7th Cir. 1981) involved a reversal of a trial court's ruling that a *per se* analysis applied; the appellate court remanded for a determination of "whether the challenged conduct 'went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purpose was asserted for it.'" *Id.* at 790.

Respondent would have this Court believe there is something radical in the notion that a private association's rulemaking should be treated as a conspiracy of the members. Yet, the NCAA[5], the AMA[6], the National Society of Professional Engineers[7], various federations of dentists[8], and

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NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); *Law v. NCAA*, 902 F.Supp. 1394 (D.Kan. 1995), *aff'd* 134 F.3d 1010 (10th Cir. 1998).

6

Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983).

7

National Society of Professional Engineers v. United States, 435 U.S. 679 (1984).

even coalitions of Ivy League universities[9], have all been subject to antitrust scrutiny as a result of their rulemaking functions. Indeed, the very case which Respondent brandishes as revealing the "flaw" in Petitioner's argument itself concedes that private rulemaking is often treated as a conspiracy of the members, for, "[a]fter all, such organizations may, at least in some of their functions, operate essentially as a means of coordinating the actions of their independent members." *DM Research Inc. v. College of American Pathologists*, 170 F.3d 53, 57 (1st Cir. 1999).[10]

As to the remainder of Respondent's arguments, far from being reasons to deny the Petition, they emphasize that the questions presented involve critical matters of antitrust policy that this Court's jurisprudence does not fully address. Petitioner does not dispute that rulemaking is essential in sports. Yet this does not mean that *all* rulemaking of private sports regulatory organizations is beneficial or procompetitive; nor does it mean that such rulemaking should

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California Dental Ass'n v. FTC, __ U.S. __, 119 S.Ct. 1604 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

9

United States v. Brown University, 5 F.3d 658 (3rd Cir. 1993).

10

DM Research is readily distinguishable from this case. Not only did *DM Research* ***not*** reject the notion that a conspiracy existed, but the standard in *DM* was merely advisory and did not result in complete market foreclosure of the product in question.

enjoy blanket immunity from antitrust scrutiny. As this Court recently recognized, the anticompetitive threat posed by the activities of non-profit organizations is more insidious than that of for-profit organizations, for non-profit associations can hide behind "a screen of superficial disinterest" while pursuing the interests of their for-profit members. *California Dental Ass'n*, *supra*, at 1612.

Respondent contends that the law must allow for quick disposition of knee-jerk challenges to private rulemaking that might threaten the existence of organizations whose rule-making benefits society. Yet, the flip-side of that coin is that where, as here, the private association's rulemaking deprives the consuming public of a product for which there is high demand, and forces from the market a strong new competitor who, through valid competition, threatens the status quo, *that* kind of rulemaking requires scrutiny by the courts if the goals of the Sherman Act are to be realized. For, in the end, the Sherman Act's paramount goal is to protect and promote economic competition; it is *not* to ensure that entities are immunized from lawsuits to which they have subjected themselves by presuming to control the operation of free markets.

CONCLUSION

Accordingly, the petitioner, Super Sulky, Inc., respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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August 1999

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NORTHERN DISTRICT OF OHIO FILINGS:

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Transcript of Trial Proceedings had before the Honorable David D. Dowd, Judge of said Court, on Monday, July 21, 1997 at 8:28 o'clock a.m., filed 7/22/97 (Excerpts from the testimony of Glen Huber) I1-I5

Transcript of Trial Proceedings had before the Honorable David D. Dowd, Judge of said Court, on Tuesday, July 22, 1997 at 8:30 o'clock a.m., filed 7/23/97 ..... J1-J4

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

(Excerpt from the testimony of Kent Hastings)

U.S. District Court Case No. 93-CV-1814
Filed September 5, 1997

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Pages G-1 thru G-3

IN THE UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

APPEARANCES:

For the Plaintiff: Joel L. Levin, Esq.
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1370 Ontario St. - 1st Floor
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For the Defendant: John J. Chester, Esq.
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Court Reporter: Richard G. DelMonico
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Two South Main Street
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(330) 535-2280

A. I haven't looked for it.

Q. Well, what did you write after you wrote the Jerald numbers now in 3 B, what do you say in parentheses after 3 B in your writing?

A. It says "eliminates Cheetah style bikes".

Q. And then it has an arrow pointing 42 to 50, right?

A. Yes.

Q. And the Cheetah style of that measurement is 19?

A. Right?

I can tell you what that note says, I don't know if that's what it relates to or not.

Q. And these drafts were all done before the pole, correct?

A. Yes.

Q. It doesn't say, does it, eliminates bent shaft? It says eliminates Cheetah style, correct?

A. That's what it says.

MR. LEVIN: I have no further questions.

THE COURT: You want to turn this off or are you through with this?

MR. LEVIN: Sure. Pardon me, your Honor.

THE COURT: Any redirect?

MR. BREY: None, your Honor.

THE COURT: You may step down, thank you.

Please call your next witness.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

(Excerpts from the testimony
of Placido "Pat" Salerno)

U.S. District Court Case No. 93-CV-1814
Filed September 5, 1997

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Pages H-1 thru H-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

– – –

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

– – –

APPEARANCES:

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Court Reporter: Richard G. DelMonico
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Akron, Ohio 44308
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there not?

A. Are you saying the June 2nd meeting? I'm sorry.

Q. Yes, there is a June 2nd meeting?

A. Was that the USTA one?

Q. That was at that time USTA?

A. All right.

Q. And showing you exhibits YYY 1, the Industry Wide Sulky Committee draft for June 2nd, 1993. Have you ever seen this before?

A. Yes, I've seen this.

Q. You were co-chair of the Committee?

A. That's correct.

Q. Now, looking through it, there are various measurements; on pages 2, 3, 4, 5, 6, 7, there are various measurements, right?

A. Correct.

Q. Where did they come from, sir?

A. They came from discussion at the meetings.

Q. Well, they were already there when you arrived at the June 2nd meeting, right?

A. No, not all of them. Most of them were parentheses with nothing in.

Q. Well, the ones that were printed, sir, where did they come from?

A. I don't know.

Q. They just appeared at the June 2nd meeting, is that your testimony?

A. I don't know where they came from.

Q. Did you ever ask anybody why they were there, why they were the starting point?

A. Not particularly.

Q. As co-chair of the Committee you had no interest in who authored this paper and where they got the measurements, is that your testimony?

A. Well, I presume they must have come from something for us to start with.

Q. And did you ever question where they came from?

A. I don't believe I did.

Q. Do you know who drafted them?

A. No, I don't.

Q. Do you know what the basis for the measurements were in the original proposal?

A. No, I really don't.

Q. Okay. So, just so it's clear, Mr. Salerno, you have no idea at all how the original specifications that were the starting point came to arise in this June 2nd draft, is that right?

A. My intention is they were taken off a modified sulky and that's what we started with.

Q. That's different than what you just told me. Why do

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 21, 1997 AT 8:28 O'CLOCK A.M.

(Excerpts from the testimony of Glen Huber)

U.S. District Court Case No. 93-CV-1814
Filed July 22, 1997

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Pages I-1 thru I-5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)
Plaintiff,	)
	) Civil Action No.
vs.	) 93-CV-1824
	)
U.S. TROTTING ASSN., et al.	)
Defendant.	)

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 21, 1997 AT 8:28 O'CLOCK A.M.

– – –

APPEARANCES:

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Akron, Ohio 44308
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Recorded by mechanical stenography; transcript produced by computer-aided transcription.

Wing: He went, he gave a long discussion as to how save the Cheetah was, didn't he, as a representative of New York?

A. He spoke to the committee, yes.

Q. And did he state again and again in a number of ways how safe the Cheetah was?

A. Yes, he stated how he thought that the -- how safe the Cheetah was.

MR. LEVIN: Now, can I have YYY-1, John

BY MR. LEVIN:

Q. I'm going to show you where we were a few minutes ago, YYY-1. It's, I believe, in the jury notebook from the defendants, from the defendant.

See if we can go back through this. YYY-1 was an early draft of the new sulky standards, correct?

A. Yes.

Q. And in those standards there are very specific measurements and distances that have to be met; is that right?

A. Yes.

Q. And would you agree with me, sir, that these standards and these distances would have eliminated the Cheetah Super Sulky?

A. Yes, I'm sure they would have.

Q. Now, what I want to know is as of the time that these standards were drafted, what evidence did you have on June 2

Q. And it says: Since the Cheetah-type sulky has been introduced in our racetrack, we have found far fewer incidents of accidents; do you see that?

A. Yes.

Q. Do you recall that testimony being given to you on the committee:

A. I'm sure it was given. I don't recall it.

Q. Did that testimony figure at all in any way in your -- in the June 2 standards banning the Cheetah, that particular testimony?

A. Well, I'm sure we took all testimony into consideration.

Q. Now, there are a number of -- on Exhibit YYY-1, there are a number of measurements, correct?

A. Yes.

Q. And do you know where those measurements came from?

A. They were introduced to the committee, I believe, by the standardbred breeders and owners in New Jersey.

Q. Do you know how they got them?

A. I believe they got those -- got the measurements from one of the conventional sulkies.

Q. As they measured a conventional sulky and put those standards down; is that right?

A. I believe that's correct.

Q. Do you know whether any of the manufacturers had a hand

in measuring or drafting those original standards?

A. No.

Q. No, you don't know?

A. No.

THE COURT: Do you know who directed they be prepared?

THE WITNESS: No, your Honor.

THE COURT: The committee didn't do that?

THE WITNESS: No.

THE COURT: They were just suddenly presented at this meeting?

THE WITNESS: One of the committee members brought them to the committee meeting.

THE COURT: And who was that?

THE WITNESS: I believe it was -- I believe it would have been Pat Salerno.

BY MR. LEVIN:

Q. I want to show you Exhibit 43. I want you to take a look at -- I'm going to ask you to compare 43 and YYY-1. But first, can you tell us what Exhibit 43 is. Have you ever seen that before?

A. I believe I've seen this.

Q. Okay. It is a sulky specifications meeting, April 17 document, right?

A. Yes. JA 1283

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON TUESDAY, JULY 22, 1997 AT 8:30 O'CLOCK A.M.

U.S. District Court Case No. 93-CV-1814
Filed July 23, 1997

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Pages J-1 thru J-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al._	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

- - -

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON TUESDAY, JULY 22, 1997 AT 8:30 O'CLOCK A.M.

- - -

APPEARANCES:

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Court Reporter: Joan Zengler
Caroline Mahnke
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2 South Main Street - Room 425
Akron, Ohio 44308
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

same level as the seat. All bent-shafts are the feet up high in relation to the seat as a bent shafts. Cheetah style bent shafts also had the feet close together.

THE COURT: The court will take a recess for about five minutes.

(Recess taken, 1:30 to 1:35 p.m.)

THE COURT: The motion of the plaintiff to exclude the results of the poll is denied. I'm going to instruct the jury that I am permitting the witness to offer expert testimony. It is their obligation to scrutinize his testimony as they would the testimony of any other witness.

I'm also going to indicate to the jury that the results of the poll do not, standing alone, constitute proof as to the safety or lack of safety of the Cheetah style or the bent-shaft style sulky.

With exceptions of the plaintiff, we'll proceed.

Do you want to call the witness back, please.

(Jury in, 1:35 p.m.)

THE COURT: Members of the jury, the present witness has been qualified as an expert in his field of survey methods and I will allow him to offer opinions with respect to the survey that was conducted in this case of the drivers.

It is your obligation to scrutinize the opinion of experts the same as you would the testimony of other

witnesses. You may accept all, part or none of what an expert witness has to say just as you may accept all, part or none of what a fact witness has to say.

Moreover, I will permit the defendant to offer the results of the poll, but I caution you that the results of the poll do not, standing alone, constitute any proof as to the safety or lack of safety of the Cheetah-style sulky or the bent-shaft sulky.

You may proceed.

BY MR. BREY:

Q. With the court's permission I will show the witness a copy of the Defendant's Exhibit EEEE-1.

THE COURT: That's the survey itself.

MR. BREY: This is the survey itself.

THE COURT: I believe they have a copy or they can look it up in their -- would you give the number for them again.

MR. BREY: It is four E's dash 1, and it is in the jury notebook of the defendant, the blue one

BY MR. BREY:

Q. Dr. Krosnick, is this Exhibit EEEE-1 the exhibit that -- well, what is that exhibit?

A. This appears to be a copy of the questionnaire that I was given representing the questionnaire that was mailed out to respondents, and it matches the questionnaires that I was